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Attorneys for Defendants
WELLPATH MANAGEMENT, INC.

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

ALAMEDA COUNTY MALE PRISONERS
And Former Prisoners, DANIEL GONZALEZ,
et al. on behalf of themselves and others
similarly situated, as a Class, and Subclass;
ALAMEDA COUNTY FEMALE
PRISONERS And Former Prisoners, JACLYN
MOHRBACHER, ERIN ELLIS, DOMINIQUE
JACKSON, CHRISTINA ZEPEDA, ALEXIS
WAH, AND KELSEY ERWIN, et al on behalf
of themselves and other similarly situated,

Plaintiffs,

v.

ALAMEDA COUNTY SHERIFF'S
OFFICE, ALAMEDA COUNTY, Deputy Joe,
Deputy Ignont (sp) Jane ROEs, Nos. 1 – 25;
WELLPATH MANAGEMENT, INC., a
Delaware Corporation (formerly known as
California Forensic Medical Group) a
corporation; its Employees and Sub-
Contractors, and Rick & Ruth ROEs Nos. 26-
50; **ARAMARK CORRECTIONAL**
SERVICES, LLC, a Delaware Limited
Liability Company; its Employees and Sub-
Contractors, and Rick & Ruth ROES Nos.
51-75,

Defendants.

Case No.: 3:19-cv-07423 JSC

**DEFENDANT WELLPATH
MANAGEMENT, INC.'S
MOTION TO DISMISS
PLAINTIFF MICHAEL
LOCKHART PER FRCP
RULE 37(b)(2)(A); REQUEST
FOR EXPENSES AND FEES**

Hearing Date: November 16, 2023
Hearing Time: 10:00 a.m.
Hearing Dept: 8

Action Filed: November 12, 2019
Judge: Hon. Jacqueline Scott Corley
Ctrm: 8—19th Floor

3:19-cv-07423 JSC

**DEFENDANT WELLPATH MANAGEMENT, INC.'S MOTION TO DISMISS PLAINTIFF
MICHAEL LOCKHART PER FRCP RULE 37(b)(2)(A); REQUEST FOR EXPENSES AND FEES**

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on November 16, 2023, at 10:00 a.m. or as soon thereafter as the matter may be heard in the above-entitled court located at 450 Golden Gate Ave., San Francisco, California, Courtroom 8, Defendant WELLPATH MANAGEMENT, INC. (“Wellpath”), moves pursuant to FRCP Rule 37(b)(2)(A), to dismiss Plaintiff Michael Lockhart’s claims alleged in the Fifth Amended Complaint for failure to prosecute the case. Wellpath respectfully requests that this Court dismiss Plaintiff Lockhart’s claims with prejudice, and order expenses and fees be paid in accord with FRCP Rule 37(b)(2)(C).

This motion will be based on this motion and notice of motion; the memorandum of points and authorities in support thereof; and any and all pleadings and papers filed herewith; and any oral argument presented at the hearing of this matter.

Respectfully submitted,

Dated: October 12, 2023

BERTLING LAW GROUP

/s/ Peter G. Bertling

Peter G. Bertling

Jemma Parker Saunders

Attorneys for Defendant

WELLPATH MANAGEMENT, INC.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND STATEMENT OF FACTS

On April 20, 2022, Plaintiffs, including Michael Lockhart (“Mr. Lockhart”) filed a Fifth Amended Complaint. ECF No. 180. On July 13, 2023, Mr. Lockhart was served a deposition notice for his deposition set for August 25, 2023, at 10:00 a.m. See Declaration of Peter G. Bertling in Support of Motion to Dismiss “Bertling Dec.” at ¶2. On August 21, 2023, Plaintiffs’ counsel advised Defendants that Mr. Lockhart would not be appearing for his deposition and the deposition would not be rescheduled. Plaintiffs’ counsel thereafter declined to join in a stipulation to dismiss Mr. Lockhart’s claims. Bertling Dec. at ¶3. On September 22, 2023, Defendants sought a court order compelling Mr. Lockhart to appear for deposition. ECF No. 317.

On September 25, 2023, this Court Ordered Defendants to serve a deposition notice on Plaintiffs’ counsel noticing the deposition of Mr. Lockhart for October 5, 2023, by 5:00 p.m. on September 25, 2023. ECF No. 320. The Court also Ordered: “Plaintiffs’ counsel shall serve Mr. Lockhart with a copy of this Order and the information regarding the time and place of the deposition. Plaintiffs’ counsel shall file proof of service by noon, September 26, 2023.” ECF No. 320, p. 2. Wellpath complied with ECF No. 320, properly serving notice of Mr. Lockhart’s deposition. at ¶6. Plaintiffs’ counsel failed to comply with the orders set forth at ECF No. 320, to which Wellpath advised the Court. ECF Nos. 323 and 326.

Subsequently, on October 3, 2023, Plaintiffs’ counsel wrote to defendants that Mr. Lockhart would not appear at his October 5, 2023, deposition and would stipulate to a dismissal. Bertling Dec. at ¶7. Wellpath prepared a proposed dismissal, which Plaintiffs’ counsel declined to execute, stating she would only agree to a dismissal without prejudice. She offered no explanation as to making this distinction, particularly as ECF No. 320 mentioned nothing about a dismissal “without prejudice.” Bertling Dec. at ¶8.

Having no dismissal executed nor filed related to Mr. Lockhart, defendants were forced to appear at the noticed deposition date and time. Neither Mr. Lockhart nor

1 Plaintiffs' counsel appeared. Defendants therefore obtained a certified of non-appearance
2 of Mr. Lockhart. Bertling Dec. at ¶9.

3 Therefore, on the basis of violation of this Court's Order at ECF No. 320, and on
4 the basis of failure to prosecute per FRCP Rule 37(b)(2)(A), Wellpath now respectfully
5 requests this Court dismiss the totality of Mr. Lockhart's claims in this case with
6 prejudice, and order expenses and fees to be paid as set forth below.

7 **II. PLAINTIFF LOCKHART'S DISOBEDIANCE OF A** 8 **DISCOVERY ORDER.**

9 Federal Rule of Civil Procedure 37 provides in relevant part that "if a party or a
10 party's officer, director, or managing agent--or a witness designated under Rule 30(b)(6)
11 or 31(a)(4)--fails to obey an order to provide or permit discovery, including an order
12 under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further
13 just orders. They may include the following: . . . (v) dismissing the action or proceeding
14 in whole or in part. . ." FRCP Rule 37(b)(2)(A)(v). "If a party fails to comply with an
15 order under Rule 35(a) requiring it to produce another person for examination, the court
16 may issue any of the orders listed in Rule 37(b)(2)(A)(i)-(vi), unless the disobedient party
17 shows that it cannot produce the other person." FRCP Rule 37(b)(2)(B).

18 Further, fees and expenses are also justified. Instead of or in addition to the orders
19 above, the court **must** order the disobedient party, the attorney advising that party, or
20 both to pay the reasonable expenses, including attorney's fees, caused by the failure,
21 unless the failure was substantially justified, or other circumstances make an award of
22 expenses unjust." FRCP Rule 37(b)(2)(C).

23 **III. ARGUMENT**

24 Defendant Wellpath obtained a Court Order requiring Mr. Lockhart to appear at
25 deposition on October 5, 2023. ECF No. 320. Mr. Lockhart did not appear at this court-
26 ordered deposition and would not execute a stipulation to dismiss his claims with
27 prejudice in advance of the proceeding. Bertling Dec. at ¶¶8,9. This Court specifically
28 instructed Mr. Lockhart that if he did not appear at the October 5, 2023, deposition, his

1 claims would be dismissed. Given his non-appearance, Mr. Lockhart's claims should be
2 dismissed with prejudice.

3 In addition, defendants were forced to incur expenses and costs associated with
4 Mr. Lockhart's violation of the Court Order, including: 1) court reporting fees; 2)
5 attorney fees associated with taking the deposition; and 3) attorney fees associated with
6 filing this motion. As set forth in the declaration of Peter G. Bertling, the total expenses
7 per FRCP Rule 37(b)(2)(C) are \$1,300. Bertling Dec. at ¶10.

8 **IV. CONCLUSION**

9 For all the foregoing reasons, Defendant Wellpath requests that this Court exercise
10 its authority and issue an Order dismissing Plaintiff Michael Lockhart's claim with
11 prejudice against Defendant Wellpath as alleged in Plaintiffs' Fifth Amended Complaint,
12 and for an order of expenses in the sum of \$1,300 per FRCP Rule 37(b)(2)(C).

13 Respectfully submitted,

14 Dated: October 12, 2023

BERTLING LAW GROUP

15
16 /s/ Peter G. Bertling

Peter G. Bertling

17 Jemma Parker Saunders

18 Attorneys for Defendant

19 WELLPATH MANAGEMENT, INC.